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In the Matter of:                *
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John Grady                      *
    Claimant                     *
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                                Case Nos.: 1998-LHC-2461
                                1998-LHC-2462
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                                *
Electric Boat Corporation/      *
Pequot River Shipworks        *
    Employers                    *
                                OWCP Nos.: 1-143582
                                1-141524
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CIGNA Insurance Company       *
    Carrier                      *
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Appearances:

Scott N. Roberts, Esq.
For the Claimant

Peter D. Quay, Esq.
For the Employer/Electric Boat Corp.

Lucas D. Strunk, Esq.
For the Employer/Pequot River Shipworks

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for workers' compensation benefits under the the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on September 23, 1998 in New London, Connecticut at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit, RX for an exhibit offered by Electric Boat Corporation, and PRSX for an exhibit

offered by Pequot River Shipworks. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
PRSX 10	Attorney Strunk's September 30, 1998 letter to counsel	10/08/98
PRSX 11	Notice of Deposition of Eric N. Thompson, M.D.	10/20/98
RX 5	October 26, 1998 letter from Attorney Quay with	10/29/98
RX 6	October 5, 1998 report from Philo F. Willetts, M.D.	10/29/98
CX 10	October 30, 1998 letter from Claimant's attorney with	11/02/98
CX 11	September 29, 1998 deposition of Jeffrey A. Salkin, M.D.	11/02/98
RX 7	November 3, 1998 letter from Attorney Quay responding to objection to Dr. Willetts' report	11/06/98
PRSX 12	October 30, 1998 letter from Attorney Strunk objecting to report of Dr. Willetts	11/09/98
ALJ EX 10	This Court's November 9, 1998 Order	11/10/98
PRSX 13	November 17, 1998 letter from Attorney Strunk with	11/23/98
PRSX 14	October 29, 1998 deposition of Eric N. Thompson, M.D. enclosed	11/23/98

The record was closed on November 23, 1998, as no further documents were filed.

Stipulations and Issues

The parties stipulate (TR 7-8, PRSX 12), and I find:

1. The Act applies to this proceeding.
2. Claimant and both Employers were in an employee-employer relationship at the relevant times.
3. The parties complied with all notice, claim and controversion provisions.
4. The parties attended an informal conference on June 10, 1998.
5. The applicable average weekly wage is \$751.50.

The unresolved issues in this proceeding are:

1. Causation of Claimant's back injury.
2. The nature and extent of Claimant's disability.
3. Authorization of medical treatment and payment of certain unpaid medical bills.
4. Responsible Employer.
5. Attorney's fee

Preliminary Evidentiary Issue

By letter dated October 30, 1998, counsel for Pequot River Shipworks objected to the introduction into the record of the October 5, 1998 report of Philo F. Willetts, Jr., M.D. (PRSX 12) Counsel argues that Dr. Willetts is not a treating physician in this case, and that introduction of the report is inappropriate particularly in light of the fact that "it is clear that Dr. Willetts is not basing his opinion on the record before the court." (PRSX 12) By letter dated November 3, 1998, counsel for Electric Boat Corporation, noting receipt of the objection to Dr. Willetts' report (RX 7), pointed out that the intention to offer the report was made at the formal hearing, and no objection was proffered at that time. (RX 7)

Pequot's objection to the report of Dr. Willetts is overruled, and such report will be admitted into the record. Counsel for the Electric Boat Corporation indicated at the formal hearing that he would be offering the report of Dr. Willetts, and Pequot made no objection at that time. (TR 21, 98) Furthermore, Pequot's objections that Dr. Willetts is not a treating physician and that he did not base his opinion on the record before this Court, are not reasons to exclude his report, as the report is relevant and material to the unresolved issues presented herein, is not unduly cumulative and the objections actually go to the weight to be accorded to the opinions of Dr. Willetts.

SUMMARY OF THE EVIDENCE

John M. Grady ("Claimant" herein)¹, forty-eight (48) years of age, first became employed as a fabricator at Pequot River Shipworks ("Pequot" herein) on or about September 2, 1997. Pequot River Shipworks is a maritime facility along the navigable waters of the Thames River where Pequot engages in the construction of passenger ferries. As a fabricator, Claimant's position entailed taking blanks of plate steel, doing the layout work on it, and have it cut, bent and welded in order to build various foundations, boats and miscellaneous items. (TR 26-38)

Claimant's medical history reveals numerous complaints of back pains and injuries predating his alleged shipyard accident on January 19, 1998. Prior to his Employment at Pequot, Claimant was employed as a shipfitter at the Electric Boat Corporation ("Electric Boat" herein) from December 3, 1976 until August 15, 1997.² In 1986, Claimant was injured while trying to crawl out of a hole after doing a layout job. He had a sharp pain running from his mid-back to his ankle, and he could not walk and it hurt for him to bend over. Claimant treated with Dr. Eric Thompson, and he was given anti-inflammatories and physical therapy. He was out of work for approximately four to six months because of this injury. (TR 54-58)

An Employee Injury/Illness Case Report dated September 2, 1997, reflects that Claimant was injured on July 24, 1997. (PRSX 1) It is noted that Claimant was having pain in his lower back, right shoulder and both elbows due to grinding and climbing. The nature of the injury was found to be a strain.

¹Claimant was deposed on July 16, 1998. (PRSX 9)

²Claimant was laid off on August 15, 1997. (TR 38)

Claimant sustained another back injury in 1996. (PRSX 1; RX 1-3) He treated at the Charter Oak Medical Clinic, and they referred him to Dr. Thompson. Claimant explained that he could not remember all the back injuries he has had at Electric Boat, because there were so many of them. He also explained that his back would get injured because of "twisting, bending, getting in awful positions," and by getting twisted up in confined areas. (TR 60-62)

On January 19, 1998, Claimant was working his usual duties as a fabricator, subframing and framing the forward starboard pontoon. He dropped the flat bar several times, so he put the manlift down, bent over to pick up the flat bar, and experienced the onset of back pain. Claimant finished up his shift, and then told his supervisor, Tom Coney, that he was "feeling ugly" and he was going to see a doctor. He saw Saul D. Neuman, M.D., the next morning. In a note dated January 21, 1998, Dr. Neuman stated that Claimant would be out of work for one week. (TR 38-49; CX 4)

Dr. Neuman referred Claimant to Frank J. Toole III, PA-C, of the Thames River Orthopedic Group. In a report dated January 28, 1998, Mr. Toole noted that Claimant had pain from numerous work-related injuries in the past, and that since around January 14, 1998, he has been experiencing low back pain of unknown etiology. (CX 5A; PRSX 2) Mr. Toole also noted that on January 21, 1998, Claimant "was at work and bent over to lift an object.³ He had the acute onset of right side leg and buttock pain which has been most persistent. After performing a physical examination, Mr. Toole diagnosed a "[w]ork related right lumbar radiculopathy, most likely secondary to L5-S1 disc bulge versus disc herniation." Mr. Toole also recommended that Claimant be referred to participate in physical therapy. (CX 5A; TR 49)

An MRI of Claimant's lumbosacral spine was performed on February 25, 1998. (CX 7; PRSX 3) Faruk H. Soydan, M.D., stated his impression was of "[s]mall central and left paracentral L4 disc herniation and small central right paracentral L5 disc herniation."

Dr. Salkin continued to see Claimant for follow-up visits, and in a note dated March 2, 1998, he stated as follows (CX 5C):

John does have a small L5-S1 disc and his straight leg raise remains positive today reproducing his leg pain and calf pain.

³Mr. Toole's report incorrectly stated the date of Claimant's alleged injury as January 21, 1998. Claimant claims the injury occurred on January 19, 1998. (TR 38)

He is still unable to work. I correct my last note and routing slip that this is a work related complaint by previous history from shipworks related injury.

At this point we will set him up for some therapy and lumbar epidural injection before considering any surgical intervention.

In a report from Active Physical Therapy dated March 10, 1998, it was noted that Claimant was seen on March 3, 1998 for initial physical therapy treatment. (CX 6A) It was noted that Claimant reported sudden onset of lower back and right lower extremity pain on January 19, 1998 secondary to twisting and bending at work. The report stated that the "initial evaluation findings are consistent with an L5-S1 disc lesion. This patient is an excellent candidate for physical rehabilitation." (CX 6A)

A March 26, 1998 letter from Rita Drenga, PT, of Active Physical Therapy to Dr. Salkin indicates that Claimant received seven treatments. (CX 6B) Ms. Drenga stated as follows:

Patient appears to show increased spinal range of motion/posture/gait/strength/function. He is responding slowly to conservative treatment, and tolerates phase 1 stabilization/strengthening. I would like to continue physical therapy treatment. Please advise me if you feel this patient would benefit from continued physical therapy. I will also need a new prescription to continue therapy.

(CX 6B) Claimant was last seen for physical therapy treatment on March 24, 1998. (CX 6C)

Philo F. Willetts, Jr., M.D., saw Claimant on September 18, 1998. (RX 6) After taking the usual social, medical and working histories, and performing a physical examination, Dr. Willetts stated as follows:

DIAGNOSIS:

1. Disc herniations lumbosacral spine with low back and right lower extremity pain and objective (abnormal ankle reflex) signs of sciatic radiculopathy.
2. Mild degenerative disc lesions T11-12 - preexisting and unrelated.
3. Previous right thoracic outlet surgery, rated for impairment - preexisting.
4. Status post fractured right ankle with pending claim against New Haven Terminal Company.

DISCUSSION: I will try to respond to your questions in order as follows.

1. Did Mr. Grady have a back condition prior to commencing his employment at the Pequot River Shipyard, and if he did, was the work he performed at that shipyard an aggravating factor that led him to his present situation?

Although there had been occasional episodes of low back pain in the past, there is no evidence that Mr. Grady had an ongoing or disabling back condition as of August 21, 1997, about the time he was laid off from Electric Boat Corporation and prior to beginning work at Pequot River Shipworks.

Dr. Salkin's note of August 21, 1997, was a thorough evaluation of all of Mr. Grady's complaints that could be possibly linked to his work time at Electric Boat Corporation. Dr. Salkin elicited complaints of a variety of areas of symptoms, none of which involved the low back or lumbar spine or would be in any way related to a lumbosacral disc condition as of August 21, 1997.

Nor did any of the orthopedic notes of Dr. Derby mention any low back pain for fully 10 years prior to commencing employment at Pequot River Shipworks. Dr. Derby had seen Mr. Grady for a low back strain but made no mention of anything other than symptoms of a pulling in the back on April 24, 1978. Dr. Coulson on November 19, 1980, stated that there had been an acute lumbosacral sprain. He noted that the neurological examination was negative. This was detailed in the Emergency Room note which was stamped November 20, 1980. Dr. Derby diagnosed a back strain, reported October 22, 1984, but made no mention of any sciatic component.

Nor was there any evidence in the ongoing notes of Dr. Deren, a surgeon who performed right thoracic outlet surgery on Mr. Grady and who followed him over the years with restricted duty, [of] any evidence of a back problem or any restriction that would be related to a low back problem.

Dr. Thompson reported an episode of acute lumbosacral strain, opining that it was perhaps a facet syndrome [a condition involving the small facet joints of the posterior back and which would not have been associated with any sciatica]. The next episode of reported back pain was more than eight years later, when Dr. Carr of the Charter Oak Walk-In noted complaints of low back pain, radiating to, but not past, the knee on April 17, 1995, and noted no complaints of numbness. He stated that the straight leg raising test (a test for sciatica) was negative and that the neurological was normal. Similarly, Dr. Thompson, for the same episode, stated

that at no time did John Grady have sciatic radiation and noted that straight leg raising produced no sciatica and found no sciatic irritability nor neurological abnormality. Dr. Thompson's report of June 11, 1996, also stated that there were complaints of pain in the low back but said there was no sciatic irritability or neurological abnormality. Thus, although there had been several episodes of limited low back and rare thigh radiation of pain, there was never any documentation of a positive straight leg raising test producing sciatica, never any documentation of sciatic irritability, no abnormal reflexes associated with radiculopathy, nor any indication of the kind of back condition that Mr. Grady developed at the Pequot River Ship Works.

Dr. Thompson had seen John Grady on several occasions for low back pain. Mr. Grady had been seen at the Lawrence and Memorial Hospital Emergency Room on November 20, 1980, for low back and right thigh pain, but there was no evidence of any sciatica. The impression was acute lumbosacral sprain.

The injury of January, 1998, was described as an acute injury by the Thames River Orthopedic Group Physician's Assistant, Frank Toole, on January 28, 1998. Mr. Toole also stated that Dr. Neuman had referred Mr. Grady for a quote, "Two week history of back pain with accompanying right leg pain" as of January 28, 1998. Mr. Toole also stated that Mr. Grady has been experiencing low back pain since approximately January 14, 1998.

The current condition of Mr. Grady is unlike that found by Drs. Derby and Thompson in the past. Although neither of those orthopedic surgeons found any indication of radiculopathy, on the examination of September 18, 1998, there was an abnormal reflex showing evidence of radiculopathy. Although at no time in the past were imaging studies of the lumbosacral spine indicated, the findings of the Thames River Orthopedics Group did indicate the need for imaging studies, and an MRI showed two disc protrusions. The protrusion of the L5-S1 disc to the right is very compatible with objectively abnormally decreased right ankle reflex associated with the current condition. By the medical records reviewed, the condition was the result of the January, 1998, injury. The current radiculopathy is not similar to nor compatible with the previous documented back condition which was never documented to be accompanied by any reflex abnormality nor any evidence of sciatic irritation.

Nor was there documentation of a previous (before 1998) back condition that would be expected to have any natural or unavoidable progression to result in a January, 1998, episode of pain while working at the Pequot River Shipworks. The Pequot River Shipworks

onset of low back pain was an injury in and of itself, not the progression or residual of another or preexisting problem.

Nor was any January, 1998, injury an aggravation of some substantially preexisting condition. The January, 1998, injury was an acute injury in and of itself.

2. Is his current disability total or partial? If it is partial, would you place certain restrictions on his ability to work?

Mr. Grady is not totally disabled. He is partially disabled. Restrictions would be as follows.

In my opinion Mr. Grady should avoid lifting more than 25 pounds, avoid frequent repetitive bending, avoid working in low or tight compartments, and avoid climbing vertical ladders. He could otherwise sit, stand, walk and drive, climb and descend stairs, so long as he could occasionally change positions as comfort dictated. He could use his hands without further restriction and use his feet for foot pedal controls.

3. Is surgery necessary?

Not at this time. Although there are signs of disc protrusion, and the L5-S1 disc does appear to impinge upon the right S-1 nerve root, and although there is a decreased right ankle reflex compared to the left consistent with radiculopathy, I agree that a trial of epidural steroid injections would be helpful. Should epidural steroid injections not be successful, surgery would be an option although not absolutely necessary. There are objective findings of radiculopathy, (the decreased right ankle reflex) but there is no significant weakness or other neurological deficit that would mandate surgery. His chances of improving with surgery would be approximately 60% in my opinion, assuming that epidural steroid injections were unsuccessful.

Claimant saw Dr. Salkin, who referred him to Dr. Hargus for the epidural injections. However, Claimant was unable to make an appointment because he was told the Carrier would not pay for that medical treatment. (TR 50)

The reports of Dr. Salkin are supplemented by his deposition testimony which was taken on September 29, 1998. (CX 11) Dr. Salkin reviewed the findings Mr. Toole made in his report of January 28, 1998. He explained that based upon Claimant's complaints and the findings of a positive straight-leg raising, positive reverse straight-leg raise, Mr. Toole concluded that sciatica was present probably from the disc bulge or herniation. (**Id.** at 7-12) Dr.

Salkin next reviewed his findings from his February 18, 1998 examination of Claimant. He explained that physical findings strongly point to sciatica. (*Id.* at 12-15) He indicated that the February 25, 1998 MRI confirmed his clinical impression of Claimant's situation. (*Id.* at 15) Dr. Salkin reviewed his findings from his March 2, 1998 examination of Claimant. (*Id.* at 15-16) He indicated that "simply bending over" can cause a disc to herniate. (*Id.* at 19)

On cross-examination, Dr. Salkin indicated that it was possible that bending forward is more likely to cause a herniated disc when the particular disc in question is degenerated or weakened. (*Id.* at 23) He opined that "the wear and tear on the disc is more age-related degenerative process and it's not particularly related to any particular activity unless there's been a frank herniation." (*Id.* at 26) He also stated that "the injuries that John had prior to this January, '98 injury really seemed to have involved a different part of the spine." (*Id.*) Dr. Salkin indicated that it was possible that, at some point in time, the annulus fibrosis can be weakened to the point where some movement is going to cause the disc material to leave the confines of the annulus fibrosis. (*Id.* at 30) He also indicated that it was possible that Claimant had a weakened annulus fibrosis as a result of his past medical history. (*Id.* at 32-33) Dr. Salkin explained that Claimant could be at home picking up a sneaker and bending forward just as easily as he would be at work picking up a piece of aluminum, but the inciting event and the precipitating mechanism of injury is still the act of bending forward. (*Id.* at 34-35) He also explained that, while it was possible that the wear and tear of the many years of injury weakened the disc, the physical examinations and the impressions all the way up to 1998 did not support that. (*Id.* at 35) Dr. Salkin stated that the herniation could have occurred at the time Claimant bent forward or it could have occurred sometime before, but he was not symptomatic from the actual herniation part until the January of 1998 injury. (*Id.* at 36-37) Dr. Salkin indicated that it was possible that the mere bending forward at Pequot River Shipyard was the natural result of those years of trauma and working in confined spaces of General Dynamics, but he stated the disc herniation seems like a new injury. (*Id.* at 41)

Eric N. Thompson, M.D., was deposed on October 29, 1998. (PRSX 14) Dr. Thompson stated that he first saw Claimant in December of 1986. He stated that it was his impression that it was "mostly a muscular ligamentous injury." He also stated that Claimant did not have any neurologic abnormalities or psychiatric conditions at the time. (*Id.* at 7) Dr. Thompson noted that he treated Claimant for various back injuries from January of 1994 through July of 1997. (*Id.* at 7-9) Dr. Thompson indicated that Claimant's work histories

and injuries would constitute cumulative trauma to his back. (*Id.* at 12) He also indicated that cumulative trauma could weaken the annulus fibrosis, and could rupture the disc. (*Id.* at 13-14) Dr. Thompson explained that bending over may have been the immediate condition that precipitated the disc herniation, but he did not think that it was the sufficient and sole cause of the herniation. (*Id.* at 14-15) He agreed that it would be possible to have a precipitating event that would cause an actual disc herniation by bending forward to reach the television remote control at home or lifting an aluminum plate at work. (*Id.* at 15) Dr. Thompson opined, with reasonable medical certainty, that absent Claimant's prior history, herniation with a single episode would be very unlikely. (*Id.* at 15-16) He believed "[m]ost probably" that Claimant's cumulative trauma progressed to the point of herniating a disc at the point of simply bending forward. (*Id.* at 17)

On cross-examination, Dr. Thompson stated that he would not agree that a disc herniation was the unavoidable consequence of Claimant's condition. (*Id.* at 18) He indicated that Claimant probably has clinical disc disease. (*Id.* at 18-20) He also indicated that the symptoms in January of 1998 are new in terms of anything from his past treatment. (*Id.* at 20)

Currently, Claimant testified that his back is sore, and that he still has some pain in the hip and leg depending on how much walking and standing he does. In the course of a normal day, Claimant will "[r]ead the paper, take a walk, drive around a little bit, go visiting, have lunch, TV, a little more walking, pick some tomatoes from [his] garden, eat, help the kids with their homework, watch TV, [and] go to sleep." (TR 52-53)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard**,

Inc., 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards, supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita, supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence

of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier, supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his chronic lumbar disc syndrome, resulted from working conditions at Pequot's shipyard.

Pequot contends that Claimant did not establish a **prima facie** claim and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a) presumption.

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer, **i.e.**, substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. See **Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied**, 507 U.S. 909, 113 S.Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland**, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). This requires that the employer offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in the case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. See also **Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988)(medical expert opinion which

entirely attributed the employees' condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988)(medical testimony that claimant's pulmonary problems were consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part, only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989)(holding that causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment and the remaining 1%, which was removed shortly after his employment began, was in an area far removed from the claimant). The testimony of a physician, if credited by the administrative law judge, that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If the judge finds that the presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. **See Devine v. Atlantic Container Lines, G.I.E.**, 23 BRBS 270 (1990).

In this case, Employer has failed to produce substantial evidence to dispel the Section 20(a) presumption. Dr. Thompson testified that Claimant's work histories and injuries would constitute cumulative trauma to his back. (PRSX 14 at 12) He indicated that cumulative trauma could weaken the annulus fibrosis, and could rupture the disc. (**Id.** at 13-14) Dr. Thompson explained that bending over may have been the immediate condition that precipitated the disc herniation, but he did not think it was the sufficient and sole cause of the herniation. (**Id.** at 14-15) He agreed that it would be possible to have a precipitating event that would cause an actual disc herniation by bending forward to reach the television remote control at home or lifting an aluminum plate at work. (**Id.** at 15) Dr. Thompson opined that absent Claimant's prior history, herniation with a single episode would be very unlikely. (**Id.** at 15-16) He believed "[m]ost probably" that Claimant's cumulative trauma progressed to the point of herniating a disc at the point of simply bending forward. (**Id.** at 17)

Dr. Thompson's testimony, even when viewed in a light most favorable to Pequot, does not constitute substantial evidence to rebut the Section 20(a) presumption. At best, Dr. Thompson's testimony establishes that Claimant's employment at Pequot aggravated a pre-existing back condition. However, as such an

aggravation would constitute a work-related injury, Pequot has failed to rebut the Section 20(a) presumption. Dr. Thompson believed that Claimant's cumulative trauma progressed to the point of herniating a disc at the point of simply bending forward. However, since Claimant was acting within the scope and course of his employment when he was bending forward⁴, Dr. Thompson's testimony supports a finding that Claimant suffered a work-related aggravation of a pre-existing injury. Such an aggravation would constitute a work-related injury. Although Dr. Thompson stated that bending forward to reach the remote control at home could cause an actual disc herniation, the fact remains that Claimant complained of pain after bending over at work in Pequot's shipyard, and not in some other non-work-related situation. Dr. Thompson stated that he would not agree that a disc herniation was the unavoidable consequence of Claimant's condition.

If rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole." **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995); **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990); **Del Vecchio v. Bowers**, 296 U.S. 280 (1935). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act. Where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied**, 395 U.S. 920, 89 S.Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994). Accordingly, after Greenwich Collieries, the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted. This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2nd Cir. 1997).

⁴Claimant bent over to pick up a flat bar he had dropped while working his usual duties as a fabricator, subframing and framing the forward starboard pontoon. (TR 60-62)

Based upon the foregoing, I find and conclude that Pequot has failed in its attempt to introduce substantial evidence to rebut the Section 20(a) presumption. Accordingly, Claimant has established a **prima facie** claim that his back injury is a work-related injury, as shall be discussed below.

It is the conclusion of this Administrative Law Judge that even if the Employer had presented substantial evidence to rebut the Section 20(a) presumption, the evidence, when weighed and evaluated as a whole, conclusively establishes that Claimant sustained a work-related back injury on January 19, 1998, as shall be discussed below.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. See 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Janusiewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos, supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549

(1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In allocating liability among successive employers and carriers in the case of multiple or cumulative traumatic injuries, if the disability resulted from the natural progression of the initial injury and would have occurred notwithstanding the subsequent injury, the employer at the time of the initial injury is liable for the entire resultant disability. If, however, claimant sustains an aggravation of the initial injury, the employer at the time of the aggravation is liable for the entire disability resulting therefrom. **Foundation Constructors, Inc. v. Director, OWCP**, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991); **Kelaita v. Director, OWCP**, 799 F.2d 1308(9th Cir. 1986); **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990).

Drs. Thompson, Willetts and Salkin each offered opinions as to whether Claimant's work activities at Pequot contributed to his injury. Both Drs. Willetts and Salkin found that Claimant sustained a new work-related injury on January 19, 1998. Dr. Thompson's opinion, at best, supports a finding that Claimant sustained a work-related aggravation of a pre-existing condition. Thus, even if fully credited, his opinion would support a finding of liability against Pequot. However, I find that the opinions of Drs. Salkin and Freed are the most persuasive, and therefore, I find that Claimant's work activities on January 19, 1998 resulted in an injury to his back.

Dr. Salkin, who was treating Claimant for his work-related incident, testified that Claimant's physical findings strongly pointed to sciatica, and that the February 25, 1998 MRI confirmed his clinical impression of Claimant's situation. (CX 11 at 12-15) That MRI was interpreted to show a "[s]mall central and left paracentral L4 disc herniation and small central right paracentral L5 disc herniation." (CX 7; PRSX 3) Dr. Salkin also noted that Mr. Toole concluded that sciatica was present based upon Claimant's complaints and the findings of a positive straight-leg raising, positive reverse straight-leg raise. (CX 11 at 7-12) Dr. Salkin indicated that "simply bending over" can cause a disc to herniate. (**Id.** at 19) He explained that it was possible that bending forward is more likely to cause a herniated disc when the particular disc in question is degenerated or weakened. (**Id.** at 23) However, he also explained that the injuries Claimant had prior to the January of 1998 injury seemed to involve a different part of the spine. Dr. Salkin indicated that it was possible that the annulus fibrosis can be weakened to the point where some movement is going to cause the

disc material to leave the confines of the annulus fibrosis, and that it was possible that Claimant had a weakened annulus fibrosis as a result of his past medical history. (*Id.* at 30-33) However, Dr. Salkin also explained that while it was possible that the wear and tear of the many years of injury weakened the disc, the physical examinations and the impressions all the way up to 1998 did not support that. (*Id.* at 35)

I find Dr. Salkin's opinion to be highly credible and persuasive. He thoroughly explained that the physical findings pointed to sciatica, and that the February 25, 1998 MRI confirmed this impression. He also explained that, while it was possible that Claimant's previous injuries weakened Claimant's disc, the evidence did not support this as Claimant's prior injuries involved a different part of the spine. Dr. Salkin explained that Claimant could be at home picking up a sneaker or at work picking up a piece of aluminum, but the inciting event and the precipitating mechanism of injury is still the act of bending forward. Dr. Salkin's findings are consistent with Claimant's description of events surrounding his injury. Claimant explained that, although his back was usually somewhat sore at the end of the day from working, he felt even greater pain on January 19, 1998, when he bent over to pick up the flat bar he had dropped. He also explained that when he left Electric Boat in August of 1997, he did not have pain that radiated down his leg.

The January 28, 1998, report of Mr. Toole also supports a finding that Claimant sustained a new and discrete work-related injury on January 19, 1998. (CX 5A; PRSX 2) Mr. Toole noted that Claimant had been experiencing low back pain of unknown etiology since around January 14, 1998, and that on January 21, 1998, Claimant was at work when he bent over to lift an object. He also noted that Claimant had the acute onset of right side leg and buttock pain. Mr. Toole diagnosed a "[w]ork-related right lumbar radiculopathy, most likely secondary to L5-S1 disc bulge versus disc herniation." Mr. Toole's opinion is consistent with that of Dr. Salkin and the February 25, 1998 MRI.

The September 18, 1998 report of Dr. Willetts further supports the finding that Claimant sustained a work-related injury on January 19, 1998. (RX 6) Dr. Willetts' diagnosis was as follows:

1. Disc herniations lumbosacral spine with low back and right lower extremity pain and objective (abnormal ankle reflex) signs of sciatic radiculopathy.
2. Mild degenerative disc lesions T11-12 - preexisting and unrelated.

3. Previous right thoracic outlet surgery, rated for impairment - preexisting.
4. Status post fractured right ankle with pending claim against New Haven Terminal Company.

Dr. Willetts examined Claimant and reviewed an extensive amount of medical evidence and determined that Claimant's current condition is the result of the January, 1998, injury. He noted that neither Drs. Derby nor Thompson found any indication of radiculopathy in the past, but that on the examination of September 18, 1998, there was an abnormal reflex showing evidence of radiculopathy. He also noted that at no time in the past were imaging studies of the lumbosacral spine indicated, but the findings of the Thames River Orthopedics Group did indicate the need for imaging studies. Dr. Willetts explained that the MRI showed two disc protrusions, and that the protrusion of the L5-S1 disc to the right is very compatible with objectively abnormally increased right ankle reflex associated with Claimant's current condition. As with Dr. Salkin, Dr. Willetts found that Claimant's "current radiculopathy is not similar to nor compatible with the previous documented back condition which was never documented to be accompanied by any reflex abnormality nor any evidence of sciatic irritation." Dr. Willetts found that the "Pequot River Shipworks onset of low back pain was an injury in and of itself, not the progression or residual of another or preexisting problem."

Dr. Thompson indicated that Claimant's work histories and injuries would constitute cumulative trauma to his back. (PRSX 14 at 12) He explained that cumulative trauma could weaken the annulus fibrosis, and could rupture the disc. (*Id.* at 13-14) He further explained that bending over may have been the immediate condition that precipitated the disc herniation, but he did not think it was the sufficient and sole cause of the herniation. (*Id.* at 14-15) Dr. Thompson opined that absent Claimant's prior history, herniation with a single episode would be very unlikely. (*Id.* at 15-16) He believed "[m]ost probably" that Claimant's cumulative trauma progressed to the point of herniating a disc at the point of simply bending forward. (*Id.* at 17). Dr. Thompson agreed that it would be possible to have a precipitating event that would cause an actual disc herniation by bending forward to reach the remote control at home or lifting an aluminum plate at work. (*Id.* at 15)

In view of the foregoing, I find that the medical evidence supports the conclusion that Claimant's work activities on January 19, 1998, resulted in an injury to Claimant's back, as explained by Drs. Salkin and Willetts. Although Dr. Thompson opined that Claimant's cumulative trauma progressed to the point of herniating a disc at the point of simply bending over, he also stated that he

would not agree that a disc herniation was the unavoidable consequence of Claimant's condition. (PRSX 14 at 18) Even if Dr. Thompson were correct in his opinion that Claimant's cumulative trauma progressed to the point of herniating because of Claimant's bending forward, the uncontradicted testimony establishes that Claimant was bending forward while engaged in his usual employment at Pequot. Claimant credibly testified that his back was often sore due to work, most notably at the end of the day, but that on January 19, 1998, he felt a sharp pain when he bent over to pick up the flat bar he had dropped. He also testified that the pain was greater and more constant than it had been previously. (TR 46-49)

Although Dr. Thompson testified that the precipitating event could have been bending forward to reach the remote control at home or lifting an aluminum plate at work, there is no credible evidence in the record which would support a finding that Claimant injured his back from bending over in any way other than that which he testified. Thus, Dr. Thompson's testimony establishes that Claimant suffered a work-related aggravation of a pre-existing lumbar condition, which would place liability on Pequot for the January 19, 1998 work-related aggravation. However, for reasons previously stated, I find the opinions of Drs. Salkin and Willetts to be more persuasive. Dr. Salkin was treating Claimant based on the January 19, 1998 incident, and Dr. Willetts conducted a physical examination and records review. Although Dr. Thompson had treated Claimant numerous times for previous back injuries, he did not examine Claimant subsequent to the January 19, 1998 incident. I found the opinions of Drs. Salkin and Willetts to be well-reasoned and persuasive as they were supported by Claimant's testimony, medical history, MRI results, and the opinions of Mr. Toole and each other.

Therefore, I find and conclude that Claimant sustained a new and discrete work-related injury on January 19, 1998, that Pequot had timely notice and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to Claimant's age, education, industrial history and the availability

of work she can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once Claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the Employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movable Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating her willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established he cannot return to work as a fabricator. The burden thus rests upon the Employer to demonstrate the existence of suitable alternative employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternative employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980).

Claimant's injury has not become permanent. A permanent disability is one which has continued for a lengthy period of time and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General**

Dynamics Corporation v. Benefits Review Board, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding and Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that Claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipbuilding Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978), or that Claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir.

1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell, supra**. See also **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp., supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 13 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant has not reached maximum medical improvement. In his March 2, 1998 follow-up note, Dr. Salkin stated that Claimant was still unable to work. (CX 5) At his deposition on September 29, 1998, Dr. Salkin indicated that he had not seen Claimant for six months. (CX 11 at 42) He explained that if Claimant is still as uncomfortable as he was in March of 1998, epidural injections would be the next step in treating Claimant. (*Id.*) Dr. Willetts also agreed that a trial of epidural steroid injections would be helpful. (RX 4) He stated that should epidural steroid injections not be successful, surgery would be an option, although not absolutely necessary. (RX 4) It is apparent that Claimant's recovery has been delayed by the failure of the Employer/Carrier ("Respondents") to authorize the recommended medical treatment.

Suitable Alternate Employment

As the Claimant has met his burden of proving the nature and extent of his disability and his inability to return to work, the next question is whether the Employer can produce sufficient evidence to reduce Claimant's disability status from total to partial. An employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker**

v. Sun Shipbuilding and Dry Dock Co., 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, this Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. V. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage earning capacity. **Cook, supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980). It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of her injury**. **Richardson, supra; Cook, supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

It is well-settled that the employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Respondents must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

Pequot has failed to offer any evidence demonstrating the availability of suitable alternate employment or realistic job opportunities which Claimant could secure if he diligently tried. As such, I find the Claimant is temporarily and totally disabled from January 20, 1998 to the present and continuing.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for her work-related injuries. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459

U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal, supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

The employer is responsible for the reasonable, necessary and appropriate medical expenses incurred by claimant after the employer's physician incorrectly diagnosed claimant's injury and released him to work because those actions were tantamount to a refusal to provide further treatment under the Act. **Atlantic &**

Gulf Stevedores v. Neuman, 440 F.2d 908 (5th Cir. 1971); **McGuire v. John T. Clark & Son of Maryland**, 14 BRBS 298 (1981). A physician's urging that the employee return to work may constitute a refusal of treatment. **Rivera v. National Metal & Steel Corp.**, 16 BRBS 135 (1984). When a Claimant requests treatment and the employer fails to satisfy that request, the Claimant is entitled to reimbursement, pursuant to Section 7(d) of the Act, if the treatment he subsequently procures on his own initiative was necessary for treatment of the injury. **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988); **Rieche v. Tracor Marine, Inc.**, 16 BRBS 272 (1984); **Rivera, supra**; **Rogers v. PAL Services**, 9 BRBS 807 (1978).

The Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work-related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984). In order for a medical expense to be assessed against the Employer, the expense must be both reasonable and necessary. *See, e.g., Romeike, supra*.

Since evidence exists indicating that medical treatment is necessary for a work-related condition, claimant has established a **prima facie** case for compensable medical treatment. *See, e.g., Romeike, supra*; **Turner v. Chesapeake & Potomac Telephone Co.**, 16 BRBS 255 (1984).

Accordingly, Pequot is liable for the reasonable, appropriate and necessary medical expenses incurred by Claimant because of his January 19, 1998 work-related injury, including payment of the unpaid medical bills relating to the injury before me.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina**

Shipping, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills" **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted the entitlement to benefits by Claimant. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Respondents. Claimant's attorney has not submitted his fee application. Within thirty (30) days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Respondents counsel who shall then have twenty (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after June 10, 1998, the date of the informal conference. Services performed prior to that date should be submitted to the District Director for her consideration.

ORDER

Based on the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. Pequot and its Carrier ("Respondents" herein) shall pay to the Claimant compensation for his temporary total disability from January 20, 1998 through the present and continuing, based upon an average weekly wage of \$751.50, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Respondents shall receive credit for any compensation previously paid to the Claimant as a result of his January 19, 1998 work-related injury.

3. Respondents shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, including payment of the unpaid medical bills discussed above, subject to the provisions of Section 7 of the Act.

4. Interest shall be paid by Respondents on all accrued benefits at the T-bill rate applicable under 28 U.S.C. § 1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Respondents counsel who shall then have twenty (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on June 10, 1998.

DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:jgg:las

